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IN THE
COURT OF APPEALS OF INDIANA

DAMON MYERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0610-CR-616
	)	No. 49A04-0612-CR-690
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0510-FC-186328
Cause No. 49G02-0510-FC-186329

July 23, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

This is a consolidation of two appeals wherein Appellant-Defendant, Damon Myers (Myers), appeals his conviction for three Counts of child molesting, Class C felonies, Ind. Code § 35-42-4-3.

We affirm.

ISSUES

Myers raises four issues on appeal, which we restate as the following three issues:

(1) Whether the trial court abused its discretion in excluding evidence that one of the victims was previously sexually abused;

(2) Whether the evidence is sufficient to support his conviction; and

(3) Whether the trial court abused its discretion in sentencing him.

FACTS AND PROCEDURAL HISTORY

On a Saturday or Sunday in October of 2005, Myers babysat Elizabeth Coleman's (Coleman) four children, including her two daughters, J.C. and D.P., who were respectively eleven years old and six years old at the time. Myers and Coleman are cousins. While under Myers' supervision, J.C. and D.P. called Coleman at work and reported that Myers had inappropriately touched them. On October 21, 2005, Coleman brought J.C. and D.P. to the Child Advocacy Center in Marion County where child interviewer, Diane Bowers (Bowers), met with the girls. J.C. reported that Myers squeezed her buttocks several times, grabbed her by the arm, and tried to put his hand down the front of her shirt and jumper. J.C. also reported that Myers came up behind her and touched his private area to her buttocks. D.P. reported that Myers touched her

breasts under her clothing, and rubbed her buttocks and vagina on the outside of her clothes.

Previously, in July of 2005, Myers lived with and was romantically involved with the grandmother of nine-year-old, A.E. On October 18, 2005, Kara Casaban (Casaban) of the Indianapolis Police Department conducted a Body Safety Program at A.E.'s elementary school, after which A.E. reported to her that Myers had reached around him and touched his penis several times while A.E. sat at the computer at his grandmother's house.

On October 28, 2005, the State filed an Information charging Myers with two Counts of child molesting, one as to J.C. and one as to D.P., as Class C felonies under I.C. § 35-42-4-3 (First Cause).[1] On the same date, and under a different Cause Number, the State filed a separate Information charging Meyers with child molesting, as a Class C felony, for the molestation of A.E. (Second Cause).[2] On August 28 through 29, 2006, a jury trial was held on the First Cause. Myers was found guilty of both Counts of child molesting. On September 27, 2006, the trial court held a sentencing hearing and sentenced Myers to four years on each Count, with the sentences to run consecutive to the sentence imposed in the Second Cause.

On October 20, 2006, a bench trial was held in the Second Cause, and the trial court found Myers guilty of molesting A.E. On November 1, 2006, the trial court

[1] Cause No. 49G02-0510-FC-186328.

[2] Cause No. 49G02-0510-FC-186329.

sentenced Myers to three years, and ordered the sentence be served consecutive to the sentence imposed in the First Cause.

Myers now appeals his convictions in both Causes.[3] Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Exclusion of Evidence*

Myers first objects to the trial court's exclusion of a statement by J.C. to Bowers that she was molested previously by Coleman's estranged husband, Desmond Perry (Perry). Specifically, Myers contends that the trial court's exclusion of the statement was improper because the State did not follow the procedural requirements of Ind. Evidence Rule 412, the Rape Shield Statute.

The decision to admit or exclude evidence is within the trial court's sound discretion and is afforded great deference on appeal. *Fugett v. State*, 812 N.E.2d 846, 848 (Ind. Ct. App. 2004). We will generally not reverse a trial court's exclusion of evidence except when the exclusion is a manifest abuse of discretion resulting in a denial of a fair trial. *Id.* An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. This court will also find an abuse of discretion when the trial court controls the scope of cross-examination to the extent that a restriction substantially affects the defendant's rights. *Id*.

Evidence R. 412, in pertinent part, provides:

[3] We note that Myers filed separate Appellant's Briefs in each Cause, two days apart, on April 18 and 20, 2007, respectively. For efficiency in our review, we now consolidate his two appeals into this one Opinion.

(a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:

(1) evidence of the victim's or of a witness's past sexual conduct with the defendant;

(2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;

(3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant;

(4) evidence of conviction for a crime to impeach under Rule 609.

(b) If a party proposes to offer evidence under this rule, the following procedure must be followed:

(1) A written motion must be filed at least ten days before trial describing the evidence. For good cause, a party may file such motion less than ten days before trial.

(2) The court shall conduct a hearing and issue an order stating what evidence may be introduced and the nature of the questions to be permitted.

This rule "is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes." *Sallee v. State*, 785 N.E.2d 645, 650-51 (Ind. Ct. App. 2003), *trans. denied, cert. denied*. It has been found constitutional on its face so long as it does not violate a defendant's right to cross-examination. *Id*. at 651.

Here, prior to trial, the State filed a notice of intent to introduce child hearsay pursuant to I.C. § 35-37-4-6, Indiana's "protected person" statute. The trial court subsequently held a Child Hearsay hearing, at which Bower's interview with J.C. was introduced. During the interview, J.C. described an earlier experience of sexual abuse by

her mother's estranged husband, Perry. On the first morning of trial, relying on Evid. R. 412, the State filed a Motion *in Limine* requesting that the trial court exclude any evidence of J.C.'s prior sexual abuse by Perry, which the trial court granted. Myers now asserts that the State did not follow proper procedure by waiting until the morning of trial to address exclusion of J.C.'s statement pursuant. We disagree.

We find Myers' argument here completely misguided. In this case, the application of Evid. R. 412(b) would require Myers, the defendant, to give written notice that he proposes to offer evidence under this rule. *See Sallee*, 785 N.E.2d at 651. Therefore, if Myers wished to introduce evidence of J.C.'s past sexual conduct with Perry, *he* would have had to file a motion requesting to do so at least ten days prior to trial – not the State. *See* Ind. R. Evid. 412(b). (Emphasis added). Accordingly, we conclude the State bore no procedural responsibility as to the admission or exclusion of such evidence; and, in fact, Myers' failure to comply with Evid. Rule 412(b) effectively results in waiver of this issue on appeal. *See Sallee*, 785 N.E.2d at 651. Likewise, Myers' alternative contention that the trial court's exclusion of this evidence unconstitutionally limited his cross-examination of J.C. as to the incident with Perry fails due to his noncompliance with Ind. Rule of Evidence 412(b). *Id.* Therefore, we hold that the trial court properly excluded J.C.'s statement regarding sexual abuse by Perry.

II. *Sufficiency of the Evidence*

A. *First Cause*

Myers asserts that the evidence was insufficient to convict him of molesting J.C. and D. P. Specifically, Myers contends that the two victims' testimonies were incredibly dubious.

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *Cox v. State*, 774 N.E.2d 1025, 1028-29 (Ind. Ct. App. 2002). We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Alspach v. State*, 775 N.E.2d 209, 210 (Ind. Ct. App. 2001), *trans. denied*. The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Cox*, 774 N.E.2d at 1028-29. Here, to convict Myers of child molesting as a Class C felony, the State was required to prove beyond a reasonable doubt that he, with a child less than fourteen years of age, performed or submitted to fondling or touching, of either the child or himself, with the intent to arouse or to satisfy the sexual desires of the child or himself. *See* I.C. § 35-42-4-3(b).

Under the incredible dubiosity rule:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007).

In support of his argument, Myers asserts that J.C. and D.P. were coerced into making allegations of molestation against him by their mother, Coleman. In the next breath, however, Myers acknowledges that there is no evidence in the record of Coleman's coercion or motive in doing so. Instead, Myers once again relies on evidence that was not admitted at trial pertaining to J.C.'s accusation of molestation against Perry. In reviewing a sufficiency of the evidence claim, we will only consider the evidence most favorable to the conviction and will not consider evidence never admitted at trial. *Alspach*, 775 N.E.2d at 210.

Myers' poor argument aside, our review of the record indicates that J.C. testified at trial that Myers touched and squeezed her buttocks on top of her clothes more than once, rubbed his penis against the back of her body, and tried to put his hand down her shirt. In addition, J.C. testified that Myers grabbed her by the front of her jumper and asked if he could touch "it," while his hands were at her waist. (Transcript, First Cause p. 38). Further review of the record shows that D.P. testified at trial that Myers tried to touch her breasts underneath her clothing. D.P. also testified that while sitting on the couch with Myers, he rubbed her vagina on the outside of her clothes. Thus, our examination of each child's testimony reveals that their versions of the events are nearly identical to what they reported to Bowers upon initially being interviewed. Accordingly, we conclude that the State presented sufficient evidence that Myers molested J.C. and D.P., and that the record is void of any evidence that either J.C.'s or D.P.'s testimonies are incredibly dubious.

B. *Second Cause*

Next, Myers asserts that the evidence was insufficient to convict him of molesting A.E. As above, Myers claims that A.E.'s testimony was incredibly dubious.

Our review of the record shows that Casaban, a Safe Body Instructor for the Indianapolis Police Department, testified at the Child Hearsay hearing that during her program at A.E.'s school, A.E. indicated on a written form that he needed to talk to someone about Good Touch / Bad Touch. As a result, Casaban met with A.E. privately after the program in an empty office at the school. Initially, A.E. reported that while walking home from school one day, a group of boys jumped him, put him up against a fence, and touched his private parts. However, A.E. appeared to not know and could not tell Casaban the identities of the boys. Casaban recommended that A.E. tell a parent if this type of incident occurred again. A.E. left the meeting, though, only to return ten minutes later to tell Casaban what he called "the whole truth." (Tr., Second Cause p. 27). He then told Casaban that his grandmother's boyfriend, Myers, on more than one occasion, had come up behind him while he was playing on the computer and put his hand down A.E.'s pants and touched his penis. At trial, the record indicates that A.E. testified that Myers "would come up and sit behind me and put his hands in my underwear." (Tr., Second Cause p. 111). Therefore, A.E.'s testimony was consistent with his version of "the whole truth" previously given to Casaban. Consequently, we do not find that his testimony was inherently improbable or incredibly dubious. Rather, we conclude that the State presented sufficient evidence that Myers molested A.E.

III. *Consecutive Sentences*

Lastly, we address Myer's contention that the trial court abused its discretion in sentencing him. For the molestation of J.C. and D.P., the trial court sentenced Myers to four years for each Count, with sentences to run consecutively. In the Second Cause, the trial court sentenced Myers to three years for the molestation of A.E., with the sentence to run consecutive to that in the First Cause. Therefore, Myers now disputes his total sentence of eleven years. Specifically, Myers argues (1) it was improper for the trial court to order his sentences to be served consecutively, and (2) the trial court did not properly weigh the mitigating and aggravating factors in his cases.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, --- N.E.2d ---, 2007 WL 1816813, 6 (Ind. June 26, 2007). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). "[O]nce the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then 'impose any sentence that is authorized by statute[] and . . . permissible under the Constitution of the State of Indiana." *Anglemyer*, 2007 WL 1816813 at 6. However, "we must be told of [the trial court's] reasons for imposing the sentence. . . . This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Of course[,] such facts must have support in the record." *Id*. (quoting *Page v. State*, 424 N.E.2d 1021, 1023 (Ind. 1981)).

Likewise, the decision to impose consecutive sentences is generally within the trial court's discretion. *Shafer v. St*ate, 856 N.E.2d 752, 756 (Ind. Ct. App. 2006), *trans. denied*. Pursuant to I.C. § 35-50-1-2, a trial court shall determine whether terms of imprisonment shall be served concurrently or consecutively. In doing so, the trial court may consider aggravating and mitigating circumstances under I.C. §§ 35-38-1-7.1(a) and (b). Further, the trial court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. I.C. § 35-50-1-2(c). However, except for crimes of violence, the total of the consecutive terms to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one class higher than the most serious of the felonies for which the person has been convicted. *Id*.

Here, our review of the record in Myers' cases indicates that the trial court entered sentences authorized by statute and explained its reasons for doing so. In sentencing Myers to consecutive four-year terms of imprisonment for the molestation of J.C. and D.P., the trial court stated at the sentencing hearing in the First Cause that it found Myers' criminal history to be an aggravator. In addition, the trial court noted that two separate victims were involved. As a mitigating factor, the trial court cited that long-term imprisonment would impose a hardship on Myers' dependents. However, concluding that Myers' criminal history outweighed the single mitigator, the trial court judge announced, "I can and will give consecutive sentences." (Tr. p. 250). In the Second Cause, the trial court observed the same factors, but noted the additional mitigator that Myers waived his right to a jury trial in this Cause. Weighing the aggravator against the

mitigators, the trial court announced, "I'm going to sentence less than the [advisory] on this case, however, I am going to run it consecutive . . . having weighed [the aggravators and mitigators], I believe the aggravator [of] his criminal history does outweigh the mitigator . . ." (Tr. Second Cause pp. 144-45).

Furthermore, Myers' offenses of child molesting, all Class C felonies, constitute crimes of violence under I.C. § 35-50-1-2(a); and as three separate victims are involved, his conviction did not arise out of a single episode of criminal conduct. *See id*.; *see also Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006). We also note that Myers' total sentence under the First Cause does not even exceed that of the advisory sentence for an offense one class higher. *See* I.C. § 35-50-2-5. In addition, under I.C. § 35-50-1-2(c), it is proper for a trial court to order consecutive sentences even if they are not imposed at the same time; thus, we likewise conclude it was within the trial court's discretion to order Myers' sentence under the Second Cause be served consecutive to that in the First Cause. Consequently, based on the trial court's statement of reasons and its authorization by statute, we conclude that it was not an abuse of discretion to order Myers' sentences be served consecutively.

Myers' argument continues with a contention that because he was sentenced to less than the advisory term for a Class C felony under the Second Cause, the trial court inaccurately weighed the aggravators against the mitigators when ordering consecutive sentences. We disagree. First, as noted above, the trial court specifically declared at the sentencing hearing in the Second Cause that it found Myers' criminal history to outweigh the mitigators. Second, the relative weight or value the trial court assigns to the factors it

identifies in sentencing is not subject to our review. *Anglemyer*, 2007 WL 1816813 at 7. Rather, where the trial court has entered a reasonably detailed sentencing statement and imposed a sentence authorized by statute, as it has here, we may only revise the sentence if after due consideration of the trial court's decision, we find the sentence to be inappropriate in light of the nature of the offense and character of the offender. *Id*.; *see also* Appellate Rule 7(B).

In Myers' case, we find the trial court's sentences appropriate under this standard. Myers molested three children – his cousin's two daughters and his girlfriend's grandson. Furthermore, according to the pre-sentence investigation report, Myers' criminal history begins in 1993 and includes misdemeanor convictions for resisting law enforcement, possession of alcohol by a minor, battery, operating a motor vehicle while intoxicated, as well as felony convictions for residential entry and battery. In all, his criminal history reflects nearly twenty encounters with the law enforcement system over a twelve-year period. Thus, in light of Myers' lengthy criminal history and the nature of the crime of child molesting, we conclude that his total sentence of eleven years is appropriate.

CONCLUSION

Based on the foregoing, we conclude (1) the trial court properly excluded evidence that J.C. was previously molested by someone other than Myers; (2) the State presented sufficient evidence to support Myers' conviction on all three Counts of child molesting; and (3) the trial court did not abuse its discretion in sentencing Myers.

Affirmed.

NAJAM, J., and BARNES, J., concur.